



**THE STATE BAR
OF CALIFORNIA**

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**OFFICE OF PROFESSIONAL COMPETENCE,
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DATE: March 11, 2009

TO: Members, Board Committee on Planning, Program Development & Budget

FROM: Staff, Special Commission for the Revision of the Rules of Professional Conduct

RE: Request for Public Comment Authorization on a Proposed New California Rule of Profession Conduct 1-650 (Limited Legal Services Programs)

EXECUTIVE SUMMARY

This agenda item requests board committee authorization to publish a proposed new Rule of Professional Conduct ("RPC") 1-650 in the form attached for a 30-day public comment period.

The new RPC is proposed on an expedited basis and is separate from the comprehensive review of all of the California RPCs that the Commission is currently conducting. If the Board adopts proposed RPC 1-650 following public comment and directs its transmittal to the Supreme Court for approval, the Commission will continue its efforts to consider a proposal for a permanent RPC on the same subject as part of its overall effort to recommend comprehensive amendments for the California RPCs.

Expedited action is needed because thousands of Californians are facing serious legal issues due to the severe economic downturn in the state and the nation. Thousands of California residents are being foreclosed out of their homes and many renters are being evicted because their landlords are foreclosed; domestic violence is on the rise; and unemployment, guardianship, bankruptcy and other legal needs are increasing. These Californians are contacting advice and counsel clinics seeking legal assistance. Attorneys from law firms would be available to provide the needed assistance, but they fear doing so because California does not have a Rule of Professional Conduct that would provide some protection from imputed conflicts. Because is it impractical to conduct thorough conflict checks in the limited services situations contemplated, a firm could face serious conflicts of interest as a result of one of its lawyers helping out at a clinic. Proposed new RPC 1-650 would loosen the scope of the conflicts rules to facilitate lawyers participating in the limited legal services programs identified in the rule and permit them to provide the kind of limited legal services that are being sought, without fear of creating unwanted conflicts for the firm.

Board members with questions about this agenda item may contact Mary Yen at (415) 538-2369 or Lauren McCurdy at (415) 538-2107.

BACKGROUND

The Special Commission for the Revision of the Rules of Professional Conduct has been studying whether to recommend that California adopt an RPC based on the policy of American Bar Association's Model RPC 6.5 (Nonprofit and Court-Annexed Limited Legal Services Programs) as part of its overall effort to recommend comprehensive amendments for the California RPCs.

Adoption of a California RPC based on ABA Model RPC 6.5 is Recommendation 11 of the *Action Plan for Justice*, a Report of The California Commission on Access to Justice published in April 2007.¹ Adopting ABA Model Rule 6.5 was one of four pro bono resolutions in the *Action Plan for Justice*. Specifically, adopting the rule would facilitate attorney participation in advice and counsel clinics. The discussion of Recommendation 11 [Adopt ABA Model Rule 6.5 to facilitate attorney participation in advice and counsel clinics] states:

Model Rule 6.5 allows attorneys working in legal services and court-based advice and counsel or brief service clinics to assist clients, unless the attorney has actual knowledge of a conflict. Those volunteer attorneys would also not bring the conflict of the client served at the clinic back to the law firm.

California's ethical rules prohibit advice on a specific set of facts even at an event such as Annual Law Day clinics, if anyone in any of the firm's offices represents the adverse party. Clearing conflicts at a drop-in clinic is so burdensome that few firms attempt it.

In states that have adopted Model Rule 6.5, attorneys are able to staff clinics in poor neighborhoods and assist any client with advice and counsel or brief service as long as they have no actual knowledge of a conflict within the firm. Pro bono law firms in these states have developed a broad range of new clinical models under this Model Rule. Adoption of Model Rule 6.5 would allow far greater participation by California's law firms in providing basic counsel to thousands of low-income residents.

The State Bar should recommend to the Supreme Court that it adopt the principles contained in ABA Model Rule 6.5 into the California Rules of Professional Conduct.

At the February 20, 2009 meeting of the Special Commission for the Revision of the RPCs, there was discussion of the Board's interest in expediting consideration of adopting the policy of ABA Model RPC 6.5 in a new California RPC. The Commission discussed the possibility of drafting a separate a new RPC for expedited purposes. This would be done without hindering the Commission's continued efforts to develop a separate proposal based on the ABA Model ROC 6.5 that comports with the Commission's overall effort to recommend comprehensive amendments to the California RPCs. Following discussion at the February 20th meeting, the Commission voted to

¹ This Report is available at http://calbar.ca.gov/calbar/pdfs/reports/2007_Action-Plan-Justice.pdf.

support a version of an expedited draft new RPC 1-650 by a vote of 12-1 favoring the language of the rule itself, and 10-2 favoring the Discussion.²

PROPOSED NEW CALIFORNIA RULE OF PROFESSIONAL CONDUCT 1-650

New RPC 1-650 would apply to short-term limited legal services provided to a client under the auspices of a program sponsored by a court, government agency, bar association, law school, nonprofit organization, a qualified legal services project, or a qualified support center where there is no expectation by the attorney or client that the attorney will provide continuing representation. In this circumstance, 1) the attorney is subject to RPC 3-310 [Avoiding the Representation of Adverse Interests] only if the attorney knows that the representation of the client involves a conflict of interest; and 2) the attorney is subject to an imputed conflict of interest only if the attorney knows that another lawyer associated with the attorney in a law firm would be subject to a conflict of interest under RPC 3-310 with respect to the matter. Except for this latter imputed conflict of interest, a conflict of interest arising from the attorney's participation in one of the sponsored programs will not be imputed to the attorney's law firm.

The Discussion section contains five comments. Comment [1] discusses the circumstances under which the rule would apply. Comment [2] states that an attorney who provides legal services under the rule must secure the client's informed consent to the limited scope of the representation, what the attorney must do if a short-term limited representation would not be reasonable under the circumstances, and that, except as provided in the rule, the Rules of Professional Conduct and the State Bar Act apply to the limited representation. Comment [3] discusses application of the rule to what would ordinarily be an obligation to check systematically for conflicts of interest. Comment [4] offers discussion on the imputed conflicts of interest aspect of the rule. Comment [5] states that if, after the short-term representation commences, an attorney undertakes to represent the client in the matter on an ongoing basis, RPC 3-310 and all other rules become applicable.

The new rule is recommended with number 1-650 so that the rule follows current RPC 1-600 (Legal Services Programs).

² After the vote by the Commission, staff of the Office of Legal Services, Access and Fairness Planning offered a technical language modification. The Commission's leadership is aware of the modification. The attached proposed Rule 1-650 is the recommendation of the Commission with the technical modification incorporated.

At the February 20, 2009 meeting, the Commission had voted by a close margin to consider an expedited rule *without* any Discussion section. However, a Discussion is provided in proposed RPC 1-650 so that the Board of Governors can decide whether to include the Discussion section. ABA Model RPC 6.5 contains a Discussion section, which served as the basis for the Discussion in proposed RPC 1-650.

PUBLIC COMMENT REQUEST

It is requested that your Board Committee authorize a 30-day public comment period on proposed RPC 1-650.³ The 30-day period is warranted by the need to expedite the proposed rule, and is intended to allow the item to return from public comment in time for the Board's meeting in May 2009.

FISCAL IMPACT

None expected.

BOARD BOOK IMPACT

None expected.

PROPOSED BOARD COMMITTEE ACTION

Should the Board Committee on Planning, Program Development & Budget concur with the recommendation of the Special Commission for the Revision of the Rules of Professional Conduct, adoption of the following resolution would be appropriate:

RESOLVED, that the Board Committee on Planning, Program Development & Budget authorizes for publication in the form attached, for a thirty-day comment period, proposed new California Rule of Professional Conduct 1-650; and it is

FURTHER RESOLVED that publication of the foregoing is not, and shall not be construed as, a recommendation of approval by the Board Committee.

Attachment:

Proposed new Rule of Professional Conduct 1-650 (Limited Legal Services Programs)

³ State Bar Rule 1.10(A) states that the board committee can shorten the usual public comment period of 45-days to a minimum of 30 days.

ATTACHMENT

Proposed New Rule 1-650 of the Rules of Professional Conduct of the State Bar of California

(For public comment, March 2009)

Rule 1-650. Limited Legal Services Programs

- (A) A member who, under the auspices of a program sponsored by a court, government agency, bar association, law school, nonprofit organization, or a qualified legal services project or qualified support center within the meaning of Business and Professions Code § 6213, provides short-term limited legal services to a client without expectation by either the member or the client that the member will provide continuing representation in the matter:
- (1) is subject to rule 3-310 only if the member knows that the representation of the client involves a conflict of interest; and
 - (2) is subject to an imputed conflict of interest only if the member knows that another lawyer associated with the member in a law firm would be subject to a conflict of interest under rule 3-310 with respect to the matter.
- (B) Except as provided in paragraph (A)(2), a conflict of interest that arises from a member's participation in a program under paragraph (A) will not be imputed to the member's law firm.

Discussion:

[1] Courts, government agencies, bar associations, law schools and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services – such as advice or the completion of legal forms – that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a lawyer-client relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation.

[2] A member who provides short-term limited legal services pursuant to rule 1-650 must secure the client's informed consent to the limited scope of the representation. If a short-term limited representation would not be reasonable under the circumstances, the member may offer advice to the client but must also advise the client of the need for further assistance of counsel. See rule 3-110. Except as provided in this rule 1-650, the Rules of Professional Conduct and the State Bar Act, including the member's duty of confidentiality under Business and Professions Code § 6068(e)(1), are applicable to the limited representation.

[3] A member who is representing a client in the circumstances addressed by rule 1-650 ordinarily is not able to check systematically for conflicts of interest. Therefore, paragraph (A)(1) requires compliance with rule 3-310 only if the member knows that the representation presents a conflict of interest for the member. In addition, paragraph (A)(2) subjects the member to imputed conflicts of interest only if the member knows that another lawyer in the member's law firm is disqualified by rule 3-310.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the member's law firm, paragraph (B) provides that imputed conflicts of interest are inapplicable to a representation governed by this rule except as provided by paragraph (A)(2). Paragraph (A)(2) makes the participating member subject to imputed conflicts of interest when the lawyer knows that any lawyer in the member's law firm is disqualified by rule 3-310. By virtue of paragraph (B), moreover, a member's participation in a short-term limited legal services program will not be imputed to the member's law firm or preclude the member's law firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with rule 1-650, a member undertakes to represent the client in the matter on an ongoing basis, rule 3-310 and all other rules become applicable.